Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-4111

CARL MARTIN BRANDENFELS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I.

REFERENCE TO REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The only published report of any opinion delivered in the courts below in this case is *United States v. Brandenfels*,—F.2d—(9th Cir. 1975). A copy of this opinion is appendix A at the end of this petition.

II.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

This Petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit in Cause No. 74-1003, *United States v. Carl Martin Brandenfels.* Judgment was entered on June 30, 1975. A Petition for Rehearing filed in this cause was denied on August 13, 1975.

Pursuant to 28 U.S.C. §1254(1), this Court has jurisdiction to review the judgment in question by writ of certiorari.

III.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the trial court abused its discretion in denying a motion for the defendant for a continuance of his criminal trial for a definite period to obtain the presence and testimony of an essential defense witness, where that witness, as an indicated co-conspirator and principal, was the only person in a position to testify directly as to the guilt or innocence of the defendant.

(2) Whether the trial court erred in refusing to admit into evidence an exculpatory declaration of a co-defendant and alleged co-conspirator, made against his own penal and pencuniary interests, which declaration fully exonerated the defendant from any knowing or intentional involvement in any of the offenses charged.

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

(a) The Constitution of the United States, Amendment VI, concerning the right of an accused to the compulsory

attendance and testimony of witnesses in his behalf, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

(b) Rule 804(b)(3) of the Federal Rules of Evidence [Public Law 93-595, 93rd Cong., H.R. 5463 (1975)] provides the following:

> (b) Hearsay exceptions—the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (3) Statement against interest—a statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

V.

STATEMENT OF THE CASE

From June 11, 1973, until July 6, 1973, the petitioner, Carl Martin Brandenfels, was tried upon fifteen (15) counts of a twenty-count indictment alleging, *inter alia,* fraudulent offer and sale of a securities [15 U.S.C. §77q (a)], embezzlement of funds from a federally insured

savings and loan association [18 U.S.C. §657], falsely making and counterfeiting instruments issued by a savings and loan association [18 U.S.C. §493], and conspiracy to perform these and certain other unlawful acts [18 U.S.C. §371]. Also named in the indictment was the alleged principal and co-conspirator Kenneth H. Grove.

Kenneth H. Grove had become president of Northwest Guaranty Savings & Loan Association in January, 1970. Petitioner Brandenfels, who was in the business of purchasing and rehabilitating substandard homes for subsequent resale, loaned Grove money for the acquisition of Northwest Guaranty. Subsequently, in response to a request by petitioner Brandenfels for a loan, Kenneth Grove advised Brandenfels that he had arranged for a $1,000,000 line of credit for Brandenfels through a concern called Western Investors. Believing this loan to consist of legitimate investment funds, Brandenfels executed promissory notes and deeds of trust as security. As it turned out, however, this $1,000,000 consisted of funds fraudulently acquired from loan packages for which Grove never issued valid certificates of deposit. In May, 1971, Grove learned that this and other of his fraudulent activities at Northwest Guaranty were about to be discovered by investigators from the Federal Home Loan Bank Board. Grove therefore fled to Brazil with $400,000 in embezzled funds.

Within one month, Brandenfels learned that Grove was in Brazil and, accompanied by his attorney, flew to Sao Paolo in June, 1971, to interview Grove. Having previously invited all interested federal agencies to join in the interrogation of Kenneth H. Grove, Mr. Brandenfels and his attorney asked Mr. Grove questions which had been supplied by the Federal Home Loan Bank Board and the

Securities and Exchange Commission. In responding to this inquiry, Grove made a statement exonerating Brandenfels from any misconduct concerning Northwest Guaranty. In December, 1972, Kenneth H. Grove was arrested in Brazil and extradition proceedings were commenced.

On May 30, 1973, Brandenfels moved for a continuance of 90 to 120 days to obtain Grove's presence and testimony at his trial. This motion was renewed on the morning of June 11, 1973, the first day of trial, and was denied. Brandenfels testified in his own defense, stating essentially that while Grove may have wrongfully obtained the funds for which they were both indicted, nevertheless Brandenfels had had no knowledge that the funds had been misappropriated.

During the course of the trial Brandenfels' former attorney took the stand and attempted to relate the substance of his conference in Brazil with Kenneth Grove. In the absence of the jury, Grove's exoneration of Brandenfels was recounted but was deemed hearsay by the trial court and therefore not admitted into evidence. As an alternative to such testimony, Brandenfels sought to introduce a tape recording of Grove's statements in Brazil, but this, too, was refused by the District Court as hearsay. Both forms of evidence had been offered as exceptions to the hearsay rule allowing admission of statements which are against the declarant's pecuniary and penal intererest.

At the close of trial on July 6, 1973, petitioner Brandenfels was convicted by jury verdict of eight (8) of the fifteen (15) counts in which he was named.

Approximately 120 days after Brandenfels' trial, Kenneth Grove was in fact extradited from Brazil. On arrival, he pleaded guilty to one count of the indictment. He served

his sentence, and is now on parole residing in California. He is available to be a witness at any new trial in this case.

VI.

ARGUMENT

The affirmation by the Ninth Circuit Court of Appeals of the trial court's denial of defendant's motion for continuance is in conflict with the decisions of other courts of appeals on the same matter. *J. E. Hanger, Inc. v. United States*, 160 F.2d 8 (D.C. Cir. 1947); *Gilbert v. Lachapelle*, 127 F.2d 750 (D.C. Cir. 1942). As a named co-defendant and co-conspirator, Kenneth Grove was a critical witness in the Government's case against defendant Brandenfels. The transcript attached to the motion for continuance indicated that Grove was prepared to testify that Brandenfels was not involved in any of the fraudulent activities of Northwest Guaranty. It should be stressed that the defendant did not request an indefinite continuance of the trial; rather, the motion was for a continuance of 90 to 120 days, since Grove was awaiting extradition and was expected to be available as a defense witness within that time. Because Grove was the only person who could offer direct evidence on the question of defendant's involvement at Northwest Guaranty, the defendant was effectively denied his Sixth Amendment right to present witnesses on his own behalf by the trial court's refusal to grant a continuance so that Grove's presence and testimony could be obtained.

The affirmation by the Ninth Circuit Court of Appeals of the trial court's refusal to admit into evidence an exculpatory declaration by defendant's co-indictee under the exception to the hearsay rule for declarations against penal

and pecuniary interest conflicts with the decision of another court of appeals on the same matter. *United States v. Goodlow*, 500 F.2d 954 (8th Cir. 1974). Rule 804(b)(7) of the Federal Rules of Evidence, which provides for the admission of declarations against penal interest as an exception to the hearsay rule, was not in effect at the time of defendant's trial. However, the refusal by the Ninth Circuit Court of Appeals to apply the declaration against penal interest exception to the hearsay rule to the present case conflicts with the decision of the Court of Appeals for the Eighth Circuit in *United States v. Goodlow, supra*, wherein the court held:

> These [Federal Rules of Evidence] were not controlling at the time of defendant's trial nor are they yet in effect. Nevertheless, we believe that the proposed rule which recognizes the admissibility of declarations against penal interest reflects the overwhelming weight of authority on that question. *See, e.g.*, United States v. Seyfried, 435 F.2d 696 (7th Cir.), cert. denied, 402 U.S. 912, 91 S.Ct. 1393, 28 L.Ed.2d 654 (1971) (dicta); Mason v. United States, 257 F.2d 359 (10th Cir.), cert. denied, 358 U.S. 831, 70 S.Ct. 52, 3 L.Ed.2d 69 (1958) (dicta); State v. Larsen, 91 Idaho 42, 415 P.2d 685, 691-692 (1966); Peoples v. Springs, 60 Cal.2d 868, 36 Cal.Rptr. 841, 389 P.2d 377 (1964) (en banc); People v. Lettrich, 413 Ill. 172, 108 N.E. 2d 488, 492 (1952); Osborne v. Purdome, 250 S.W.2d 159, 163 (Mo. 1952) (en banc); Newberry v. Commonwealth 191 Va. 455, 61 S.E.2d 318, 325-326 (1950); In re Forsythe's Estate, 221 Minn. 303, 22 N.W.2d 19, 25 n.3 (1946); Sutter v. Easterly, 354 Mo. 282, 189 S.W. 2d 284, 289-290 (1945); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843, 846-850 (1923); Blocker v. State, 55 Tex.Cr. 30, 114 S.W. 814 (1908); Moore v. Metropolitan Life Ins. Co., 237 S.W.2d 210 (Mo.App. (1951); McCormick, Evidence §278 (2d ed. 1972); 5 Wigmore, Evidence §§1476,, 1477 (3d ed.) 1940).

The affirmation by the Ninth Circuit Court of Appeals of the trial court's refusal to admit into evidence an exculpatory declaration by defendant's co-indictee under the exception to the hearsay rule for declarations against penal and pecuniary interest is in conflict with applicable decisions of this court. *Chambers v. Mississippi,* 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973). The statement against interest by Grove was offered for admission into evidence as Exhibit 16 (tape recording and transcript) and through the testimony of Brandenfels' attorney, Thomas Murphy. Grove's disclosure to Murphy of his role in the fraudulent activities charged in the indictment was certainly a declaration against his penal and pecuniary interests. Within this same statement, Grove completely exculpated defendant Brandenfels from any criminal involvement. Corroboration of Grove's statements is found in the fact that federal investigators based their investigation of the situation at Northwest Guaranty on these statements. Furthermore, testimony of employees of Northwest Guaranty at trial corroborated Grove's assertion that Brandenfels played no part in decision-making at Northwest Guaranty. As in *Chambers,* the evidence offered in the present case "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest." *Chambers v. Mississippi, supra,* 410 U.S. at 301. Because Grove's out-of-court statement was critical to Brandenfels' defense, directly affecting the ascertainment of his guilt or innocence, the hearsay rule should not have been applied mechanistically. Rather, as in *Chambers v. Mississippi, supra,* the exception to the hearsay rule for declarations against penal and pecuniary interest should have been acknowledged and applied.

It should be noted that, under the Ninth Circuit's ruling, a statement against penal or pecuniary interest can be used in criminal trials against a defendant incriminated by it, but not for a defendant exculpated by it.

CHARLES A. SCHAAF
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA *Plaintiff-Appellee,* v. CARL MARTIN BRANDENFELS, *Defendant-Appellant.*	No. 74-1003 OPINION

[June 30, 1975]

Appeal from the United States District Court
for the Western District of Washington

Before: MOORE,* DUNIWAY, and TRASK, Circuit Judges.

MOORE, Circuit Judge:

Appellant Carl Martin Brandenfels was named in fifteen counts of a twenty count indictment alleging *inter alia,* fraudulent offer and sale of securities,[1] embezzlement of funds from a federally insured savings and loan association,[2] falsely making and counterfeiting instruments issued by a savings and loan association,[3] and conspiracy[4] to perform these and certain other unlawful acts. Also named in the indictment were Kenneth H. Grove and Robert V. Gnapp.[5] Brandenfels was tried alone, Gnapp having pled guilty to one count and become a government witness, and

*Honorable Leonard P. Moore, Senior Circuit Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

1. 15 U.S.C. § 77q(a).
2. 18 U.S.C. § 657.
3. 18 U.S.C. § 493.
4. 18 U.S.C. § 371.
5. Counts XVI-XX of the indictment named only Grove and Gnapp and charged them with forging obligations of a savings and loan association (18 U.S.C. § 493) and interstate transportation of forged securities (18 U.S.C. § 2314).

Grove having been unavailable at the time of trial, as hereinafter further discussed.

The trial was fairly lengthy and exceedingly complex. Brandefels was convicted on the conspiracy count and on seven counts of aiding and abetting co-indictee Grove in the embezzlement of approximately $1,500,000 from a federally-insured savings and loan association. Although the evidence introduced at trial was voluminous, the sufficiency thereof is not at issue, and a relatively brief summary will suffice to place in context the rather straightforward issues presented by this appeal.

Beginning in late 1969, Grove negotiated for the purchase of Northwest Guaranty Savings and Loan Association (Northwest Guaranty), a somewhat financially troubled institution located in Seattle, Washington. Brandenfels, who was in the business of purchasing, rehabilitating, and reselling substandard housing, actively assisted Grove in these negotiations, although he did not himself purchase any interest in Northwest Guaranty.[6] An installment sale was arranged, and in January 1970 Grove became president of Northwest Guaranty. Thereafter, Brandenfels remained actively interested in the affairs of Northwest Guaranty. In July 1970 he paid $300,000, the amount of the installment due from Grove on that date, to the former owner of Northwest Guaranty.[7] From January 1970 to January 1971, Brandenfels also purchase over $6,000,000 in brokered funds from eastern money brokers for deposit in Northwest Guaranty. (Money brokers obtain funds from depositors by paying them a "bonus" for placing money with the broker rather than directly into a savings institution. In return for a fee of about 3% of the deposit, the broker then sells the aggregate funds of many investors to persons for deposit

6. Brandenfels testified that he viewed Grove's association with Northwest Guaranty as advantageous to him (Brandenfels) from several standpoints: as a source of funds for Brandenfels' own business; as a source of financing for Brandenfels' real estate customers; and as a source of information on FHA-subsidized housing programs.

7. The $300,000 was traced to Northwest Guaranty loans made to Gnapp and Wornstaff (an unindicted co-conspirator). 18 U.S.C. § 1006 makes it unlawful for officers such as Grove to participate directly or indirectly in the proceeds of loans from the institution with which they are associated, and violation of 18 U.S.C. § 1006 was named as one of the objects of the conspiracy charged in the indictment.

in a lending institution. The institution then issues certificates of deposit directly to the individual investors.) Although the government's evidence showed that a substantial portion of these brokered funds was diverted to the personal use of Brandenfels and co-indictee Gnapp, most of the money was deposited in Northwest Guaranty, thereby dramatically raising the level of total deposits in that institution. Unfortunately for the persons involved with Northwest Guaranty, however, about January 15, 1971, the flow of brokered funds ceased as a result of a Federal Home Loan Bank Board investigation. Regulations limit the amount of brokered funds held in a federally insured savings and loan association to 5% of deposits, and the portion of brokered funds at Northwest Guaranty substantially exceeded this percentage.

Beginning almost immediately after the inflow of brokered funds terminated and continuing to the end of March 1971, Grove disbursed the approximately $1,500,000 involved in six of the embezzlement counts on which Brandenfels was convicted.[8] Grove made false entries on Northwest Guaranty's books, recording these sums as having been paid to a Kassler & Company of Denver, Colorado, for the purchase of VA and FHA loans. In fact, about $1,100,000 was disbursed directly to Brandenfels or placed in accounts over which Brandenfels either exercised total control or had partial control along with Gnapp. The government introduced evidence showing that this money was used by Brandenfels and Gnapp to make up shortages caused by the prior diversions of brokered funds and to replace the proceeds of Northwest Guaranty loans which had been made to Gnapp and been diverted by him for purposes other than those for which the money was lent. The remaining $400,000 was disbursed by Grove himself.

When in May 1971 Grove received word that Northwest Guaranty had received an inquiry from an investor about a fraudulent certificate of deposit previously issued by Grove but not recorded on the books of the institution, Grove realized that his manipulations at Northwest Guaranty were about to be uncovered. He fled the country,

8. An additional count (Count XIII) involved $40,000 disbursed on November 30, 1970.

taking with him the $400,000 which he had disbursed to himself.

Within a month, Brandenfels learned that Grove was in Brazil. Accompanied by Thomas Murphy, his then attorney, Brandenfels flew to Sao Paolo in June 1971 and interviewed Grove in a park. Among other things, Brandenfels and Murphy asked Grove questions provided by the Federal Home Loan Bank Board and the Securities and Exchange Commission, which were then in the process of investigating the affairs of Northwest Guaranty. In the course of discussions with Murphy and Brandenfels, Grove made a statement purporting to exonerate Brandenfels, Gnapp and others of any complicity in misconduct while Grove was president of Northwest Guaranty. This statement was tape recorded by Murphy.

Grove remained at large in Brazil until December 1972, when he was arrested. Extradition proceedings commenced at that time, but Grove was not returned to this country until mid-October 1973 (Brandenfels' trial had long since terminated, having lasted from June 11, 1973, to July 6, 1973).

Brandenfels testified in his own defense. He did not deny that Grove had in effect stolen $1,500,000 from Northwest Guaranty or that approximately $1,100,000 of this amount had been disbursed to him. However, Brandenfels did deny having any knowledge that the funds had been wrongfully taken from Northwest Guaranty. He testified that Grove had previously told him that he (Grove) had established a $1,000,000 line of credit for Brandenfels through a concern called Western Investors. Brandenfels stated that he had executed various promissory notes, deeds of trust, and mortgages for Grove as security, and had thought that the funds disbursed to him came from this seemingly legitimate line of credit. However, the deeds of trust and similar documents were never recorded by Grove, and Brandenfels testified that he had not retained copies for himself.

Brandenfels raises two points in this appeal. The first relates to the failure of the district court to grant a 90-120 day continuance to allow the return of Grove to this country so that Brandenfels might secure his testimony. The second concerns the refusal of the trial court to admit into

evidence the tape recording made in Sao Paolo in which Grove exculpated Brandenfels. We find no error in the rulings of the district court and accordingly affirm the judgment of conviction.

I.

On May 30, 1973, Brandenfels made an oral motion to continue his trial for 90-120 days so that Grove might be called as a witness to corroborate Brandenfels' asserted ignorance of any wrong-doing at Northwest Guaranty. The motion was denied. This motion was renewed on the morning of June 11, 1973, the first day of trial, and again denied.

As the appellant recognizes in his brief, the decision whether to grant a continuance rests in the sound discretion of the trial judge and will not be disturbed on appeal unless there has been an abuse of that discretion. *E.g.*, *United States v. Beatty*, 465 F.2d 1376 (9th Cir. 1972); *United States v. Harris*, 436 F.2d 775 (9th Cir. 1970); *McConney v. United States*, 421 F.2d 248 (9th Cir.), *cert. denied*, 400 U.S. 821 (1970); *Powell v. United States*, 420 F.2d 799 (9th Cir. 1969). We think that the district court here remained well within proper bounds. The grand jury returned the indictment in this case in October 1972. Trial was originally set for December 1972, but an order of continuance was entered on November 20, 1972, and the case eventually scheduled for trial on June 11, 1973. Grove was placed in custody in December 1972, but by June, approximately six months later, still remained in Brazil. Extradition from that country being a rather uncertain process, there was no indication that proceedings would be completed within the 90-120 day period requested by the defense, although it was assumed that Grove would eventually be returned to the United States.[9]

In view of the detailed nature of the investigation, the extensive trial preparation required of the government, and the number of witnesses expected to be called, the motion for continuanc was made fairly late in the proceedings. Meanwhile the defense, having known of Grove's whereabouts and the potential difficulty in securing his presence

9. Uncertainty that Grove would be returned within the time period requested in the motion for continuance ultimately proved to be well founded, since Grove was not in fact extradited until mid-October, slightly more than 120 days after the start of trial.

at trial, had made no motion to take his deposition although this was a possible course of action under Rule 15 of the Federal Rules of Criminal Procedure. Furthermore, there were no assurances that Grove, even if available, would waive his Fifth Amendment privilege against self-incrimination in order to testify for Brandenfels. And even if it could be assumed that Grove, upon his eventual return would agree to testify, from the standpoint of the trial judge, the proffered testimony consisting of acceptance by Grove of sole blame for misdeeds at Northwest Guaranty must have appeared somewhat suspect in view of Gnapp's plea of guilty on one count of the indictment, albeit a count in which Brandenfels was not charged. In short, under all the circumstances, we think that there was good reason for the district court to deny the motion for a continuance and to go ahead with the trial as scheduled.

II.

Appellant sought to introduce the tape containing Grove's statements made in the Sao Paolo park under an exception to the hearsay rule allowing admission of statements which are against the declarant's pecuniary and penal interests. This offer, upon the objection of the government, was refused by the district court.

First of all, it should be noted that the tape recorded statement by Grove was only marginally against his interest. Although the conversation with Murphy and Brandenfels may have set forth Grove's dealings in some detail, the recorded statement itself only inferentially inculpated Grove by exonerating Brandenfels, Gnapp and others of complicity in any "questionable transactions" at Northwest Guaranty.[10] However, even if we assume that this record-

10. The transcript of the tape, appearing at page 96 of the Record, insofar as relevant, reads as follows:

> I will however, make this statement freely: None of those people that are currently being interrogated by various federal agencies were in any way involved in any of those questionable transactions and I refer specifically to Martin Brandenfels, Robert Gnapp [and others] . . . . Mr. Brandenfels was a mortgage loan customer as was Mr. Gnapp. As far as any of these people having any knowledge about how money was originated, who, in some cases the lenders were, other than NWG, the only person that has knowledge of those facts is me, and I have, to the best of my ability, explained to Tom Murphy how these maters were handled . . . , within certain limitations.

ing qualifies as a statement, against interests, the district court properly excluded it. This Circuit has not recognized the declaration against penal interest except to the hearsay rule. *United States v. Harris*, 501 F.2d 1 (9th Cir. 1974); *United States v. Walling*, 486 F.2d 229 (9th Cir. 1973), *cert. denied*, 415 U.S. 923 (1974); *Scolari v. United States*, 406 F.2d 563 (9th Cir. 1969). Insofar as the statement may have been against Grove's pecuniary interests by subjecting him to potential civil liability for funds wrongfully appropriated from Northwest Guaranty, such liability was only a natural accompaniment of any criminal acts involving some form of theft and cannot provide grounds for admission of the statement. See, for example, *United States v. Walling*, *supra*, which in essence involved the theft and subsequent destruction of an automobile and in which this court affirmed the exclusion of a hearsay statement in which the declarant accepted prime responsibility for the acts in question.

However, appellant's contention runs deeper. He argues that we should accept the "more enlightened" view of the statements against penal interest exception embodied in *Chambers v. Mississippi*, 410 U.S. 284 (1973), and the newly enacted Federal Rules of Evidence. As to *Chambers*, this court has previously had occasion to note that the Supreme Court's ruling that certain hearsay statements should have been admitted as limited to the "facts and circumstances" of that case and further that the Supreme Court "expressly refrained from deciding 'whether, under other circumstances [the exclusion of some declaration against penal interest statements] might serve some valid state purpose by excluding untrustworthy testimony.'" *United States v. Walling*, *supra*, 486 F.2d at 238-39, *quoting Chambers v. Mississippi*, *supra*, 410 U.S. at 300. *See also United States v. Harris*, *supra*, 501 F.2d at 7. And as emphasized in both *Walling* and *Harris*, *the circumstances* surrounding the confessions sought to be introduced in *Chambers* provided considerable assurance of reliability. They had been made spontaneously shortly after the murder in question had occurred; there was other evidence in the trial corroborating the truth of the confessions; each statement was in a very real sense self-incriminatory and unquestionably against interest; and if there was any ques-

tion about the truthfulness of the statements, the declarant was in the courtroom and could have been cross-examined by the government. The circumstances in this case stand in marked contrast. They were not spontaneous but rather made 4-6 weeks after Grove had fled to Brazil and spoken directly to one of the men sought to be exculpated. Grove at that time was not in custody or awaiting extradition. It can be inferred that he did not plan to return to this country. Alternatively, even if Grove had already resigned himself to eventual apprehension and prosecution, the case against him was so overwhelming, as evidenced by his flight to Brazil, that he had little to lose by exonerating Brandenfels. And aside from Brandenfels' own testimony, there was no evidence corroborating the contention that Grove alone was to blame. Gnapp testified that he had never heard of Western Investors or a $1,000,000 line of credit obtained by Grove for Brandenfels yet Gnapp and Brandenfels had numerous joint accounts on which both could draw. Similarly, the promissory notes, deeds of trust, and mortgages which Brandenfels assertedly signed to secure the credit were never produced. As a consequence, *Chambers* is clearly distinguishable from this case.

Even if we assume *arguendo* that the Federal Rules of Evidence (effective July 1, 1975) should be applied in this appeal, they are no more helpful to Brandenfels than *Chambers*. Rule 804(b)(3) provides the following exception to the hearsay rule:

> *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissable (sic) unless corroborating circumstances clearly indicated the trustworthiness of the statement.

According to the last sentence of this provision, Grove's recorded statement would not be admissible to exculpate Brandenfals unless other circumstances clearly indicated

the truth of the statement. As we have previously set out in distinguishing *Chambers*, sufficient indicia of reliability are not present in this case.

For the foregoing reasons, we find that the appellant's objections are without merit, and accordingly the judgment of the district court is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-411

CARL MARTIN BRANDENFELS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the trial court abused its discretion in refusing to continue his trial so that he might secure the presence of a witness then outside of the United States, and (2) that the trial court improperly refused to admit into evidence certain out-of-court statements made by that same witness.

After a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted on seven counts of aiding and abetting co-defendants Kenneth Grove and Robert Gnapp in the embezzlement and wilful misapplication of approximately $1.5 million belonging to a federally insured savings and loan association, in violation of 18 U.S.C. 657; and of conspiracy to perform these unlawful acts, in violation of 18 U.S.C. 371.[1] He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed in a written opinion on June 30, 1975 (Pet. App. A), and a petition for rehearing was denied on August 13, 1975. The petition for a writ of certiorari was not filed until September 15, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason to grant the writ.

The facts are set forth in the opinion of the court of appeals (Pet. App. A-2—A-5), and may be summarized as follows. In late 1969 Kenneth Grove purchased Northwest Guaranty Savings and Loan Association, located in Seattle, Washington. Petitioner assisted in the negotiations which led to this purchase

[1] Petitioner, Grove and Gnapp were charged in fifteen counts of a twenty-count indictment. In addition to the embezzlement and conspiracy charges, all three were charged in five counts with fraud in the offer and sale of securities (certificates of deposit), in violation of 15 U.S.C. 77q(a); and in two counts of falsely making and counterfeiting instruments issued by a savings and loan association, in violation of 18 U.S.C. 493. Only Grove and Gnapp were named in the five remaining counts.

and, thereafter, became active in the operations of Northwest Guaranty.

Between January, 1970, and January, 1971, petitioner purchased over $6,000,000 in "brokered funds"[2] for deposit in Northwest Guaranty. A portion of each installment was first used to purchase certificates of deposit for the investors who had contributed the funds, and thereafter to satisfy Northwest Guaranty's obligations to the contributing investors of the previous installment. The remainder was either deposited at Northwest Guaranty or diverted to the personal use of petitioner and Gnapp or both.

In January, 1971, following an investigation by the Federal Home Loan Bank Board, the flow of brokered funds to Northwest Guaranty ceased, leaving shortages totalling approximately $800,000 caused by the diversions outlined above. Faced with this emergency, Grove engineered, by a series of false entries on Northwest Guaranty's books, the disbursal of approximately $1.5 million of Northwest Guaranty funds. These were the subject matter of

[2] The court of appeals explained a typical brokered funds arrangement as follows:

> Money brokers obtain funds from depositors by paying them a "bonus" for placing money with the broker rather than directly into a savings institution. In return for a fee of about 3% of the deposit, the broker then sells the aggregate funds of many investors to persons for deposit in a lending institution. The institution then issues certificates of deposit directly to the individual investors. [Pet. App. A-2—A-3]

six of the embezzlement counts. Approximately $1.1 million of these funds were traced directly to petitioner and co-indictee Gnapp.[3]

In May, 1971, Grove fled to Brazil when it became apparent that his misconduct as president of Northwest Guaranty was about to be discovered. In June, 1971, petitioner and his then attorney, Thomas Murphy, traveled to Sao Paulo, Brazil, to interview Grove. His attorney there tape-recorded a conversation during which Grove made a short statement concerning Northwest Guaranty, in which he said (R. 96)[4]:

> * * * I will not go into detail because the material is too lengthy to cover on tape. * * * None of those people that are currently being interrogated by various federal agencies were in any way involved in any of those questionable transactions and I refer specifically to Martin Brandenfels, Robert Gnapp [and others] * * * Mr. Brandenfels was a mortgage loan customer as was Mr. Gnapp. As far as any of these people having any knowledge about how money was originated, who, in some cases the lenders were, other than NWG, the only person that has knowledge of those facts is me * * *.

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[3] The government presented evidence showing that petitioner and Gnapp used this money primarily to cover the $800,000 brokered funds shortage. Petitioner was also convicted on an additional embezzlement count involving a $40,000 disbursal on November 30, 1970 (Pet. App. A-3).

[4] "R." refers to the record on appeal in the court of appeals.

Petitioner did not deny his active participation in the affairs of Northwest Guaranty during Grove's presidency, the fact that Grove had in effect stolen $1.5 million of Northwest Guaranty's deposits, or his receipt from Grove of approximately $1.1 million of these stolen proceeds. However, petitioner did deny any knowledge of the illicit source of those funds. Petitioner testified that he thought the money in question came through a one million dollar credit line which Grove had arranged for him with a concern called Western Investors and for which he had signed notes, mortgages, and deeds of trust as security. Grove did not record any of these security interests, however, and petitioner admitted that he had not retained copies of any of those documents he claimed to have executed in favor of Grove.

1. On October 4, 1972 petitioner, along with Gnapp and Grove, was indicted (R. 1). His trial was set for December 18, 1972, but was continued until June 11, 1973. On May 30, 1973, petitioner requested a continuance of 90 to 120 days so that he might secure Grove's testimony at his trial in support of his defense of non-involvement in the Northwest Guaranty embezzlement scheme (Pet. App. A-5). Grove at that time had been the subject of extradition proceedings in Brazil since December 1972 (Pet. App. A-4).[5] Petitioner contends due process required granting of this motion.

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[5] Grove was not returned to the United States until mid-October 1973 and petitioner's trial was concluded on July 6, 1973.

The decision to deny a motion for a continuance rests within the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of abuse. *United States* v. *Cawley*, 481 F. 2d 702 (C.A. 5); *Powell* v. *United States*, 420 F.2d 799 (C.A. 9). When weighing the merits of a continuance request designed to secure the presence of a witness then outside the jurisdiction of the court, the court is entitled to assess both the probability that the absent witness can be located and brought to the trial within a reasonable time, and the likelihood that the witness once present will provide the testimony sought by the moving party. *United States* v. *Cawley, supra; McConney* v. *United States*, 421 F.2d 248 (C.A. 9); *Powell* v. *United States, supra; Smith* v. *United States*, 273 F.2d 462 (C.A. 10); *United States* v. *Gloria*, 494 F.2d 477 (C.A. 5). In addition, the court may consider the diligence of the moving party. *Natvig* v. *United States*, 236 F.2d 694 (C.A. D.C.), certiorari denied, 352 U.S. 1014; *Burton* v. *United States*, 175 F.2d 960 (C.A. 5).

As the court of appeals, on whose opinion we rely, concluded (Pet. App. A-5—A-6):

> In view of the detailed nature of the investigation, the extensive trial preparation required of the government, and the number of witnesses expected to be called, the motion for continuance was made fairly late in the proceedings. Meanwhile the defense, having known of Grove's whereabouts and the potential difficulty in securing his presence at trial, had made no motion

> to take his deposition although this was a possible course of action under Rule 15 of the Federal Rules of Criminal Procedure. Furthermore, there were no assurances that Grove, even if available, would waive his Fifth Amendment privilege against self-incrimination in order to testify for Brandenfels. And even if it could be assumed that Grove, upon his eventual return would agree to testify, from the standpoint of the trial judge, the proffered testimony consisting of acceptance by Grove of sole blame for misdeeds at Northwest Guaranty must have appeared somewhat suspect in view of Gnapp's plea of guilty on one count of the indictment, albeit a count in which Brandenfels was not charged.

This analysis correctly applies the relevant factors to the particular facts of this record, and there is no reason for further review.[6]

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[6] The alleged conflict with two decisions of the Court of Appeals for the District of Columbia Circuit is illusory. In *J. E. Hanger, Inc.* v. *United States*, 160 F.2d 8 (C.A.D.C.), the appellant's motion for a continuance of relatively short duration (two days) came when the government abruptly ended its case after only two days, contrary to its previously announced expectation that its presentation would take at least ten days and after the trial judge had expressed willingness during the pre-trial conference to continue the trial for up to two weeks should defense counsel need the extra time to line up his witnesses. The decision in *Gilbert* v. *Lachapelle*, 127 F.2d 750 (C.A.D.C.), actually undermines petitioner's argument. In *Gilbert*, evidence which was indispensable to appellant's case was in the possession of another court trying a related suit. Appellant refused appellee's offers to photograph the critical exhibits for his use and declined an offer by the trial judge to intervene personally with the judge of

2. Petitioner also characterizes Grove's tape-recorded statement exonerating petitioner as a declaration against penal interest and argues that the trial court's exclusion of that statement as inadmissible hearsay denied him due process, contrary to *Chambers* v. *Mississippi*, 410 U.S. 284, where the Court ruled that hearsay testimony regarding confessions of a third person should have been admitted.

However, as the court of appeals concluded, *Chambers* is distinguishable. First, Grove's statement was directed only to petitioner's role in the affairs of Northwest Guaranty. He purported to exonerate petitioner in conclusory terms; he did not thereby directly incriminate himself. It therefore was not "in a very real sense self-incriminatory and unquestionably against interest" and, thus, does not even contain the threshold indicia of reliability which motivated this Court's detailed factual inquiry in *Chambers*, *supra*, 410 U.S. at 301.

Second, the third party confessions sought to be introduced in *Chambers* had been made spontaneously on three separate occasions to three different individuals, and the substance of each confession had been corroborated by some other evidence in the case. In contrast, Grove's statement exonerating petitioner

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the other court on appellant's behalf. Upholding the trial judge's subsequent denial of appellant's motion for a continuance, the court of appeals specified appellant's failure to take the opportunities afforded by appellee and the trial judge to secure the evidence by alternative means as the critical factor in its decision.

was elicited during questioning by petitioner's own attorney, and there was no evidence, with the exception of petitioner's own testimony, to support petitioner's claim of non-involvement in the Northwest Guaranty embezzlement scheme. Indeed, co-defendant Gnapp testified that he had never heard of Western Investors or petitioner's asserted credit arrangement with Grove and petitioner did not produce any trace of the notes and mortgages he supposedly executed in Grove's favor to document the occurrence of this credit transaction.

In short, Grove's statements were not "originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." [7] 410 U.S. at 300. Finally, unlike *Chambers*, the declarant was not in court at the time and subject to cross-examination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[7] Under the Federal Rules of Evidence, Rule 804(b)(3), which became effective after petitioner's trial, the statement would have been inadmissible, as the court below held, because of the absence of corroborating circumstances that "clearly indicate[d] the trustworthiness of the statement" (Pet. App. A-8).

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